No. 12271

In The United States Court of Appeals

For the Ninth Circuit

LEWIS FRED PENWELL and SUSANNAH W. PENWELL, Executor and Executrix of the Estate of Lewis Penwell, formerly Collector of Internal Revenue for the District of Montana, deceased,

Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN, and BUTTE EXECUTIVES CLUB, a non-profit unincorporated association,

Appellees.

On Appeal from the United States District Court for the District of Montana

Brief for the Appellees

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Brief for the Appellees

CIRCUIT COURT IS WITHOUT JURISDICTION

The Court is without jurisdiction to consider this appeal for the reason that the notice of appeal that was given, which appears on page 39 of the Record, recites that Lewis Penwell, individually and as Collector of Internal Revenue, is prosecuting the appeal. The said notice was served and filed on April 6, 1949. On November 19, 1948, the District Court made an order substituting Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, for defendant Lewis Penwell, deceased (R. 32). The judgment which appellant seeks to reverse is against Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, deceased, defendants substituted in place of Lewis Penwell, Collector of Internal Revenue for the District of Montana (R. 37-39).

The rule seems universal that only a party may appeal. Rule 73 (a) of Federal Rules provides:

> "... a party may appeal from a judgment by filing with the district court a notice of appeal."

Rule 73 (b) provides:

> "The notice of appeal shall specify the parties taking the appeal; . . ."

SUPPLEMENTING APPELLANTS' STATEMENT

The agreed statement of facts provides:

> "The stated purpose of plaintiff, Butte Executives Club, is as stated in Exhibits 'A' and 'B'" attached and made a part of said statement of facts. (Paragraph IX, R. 17.)

Exhibit "A" provides:

> "Section 1: The purpose and objects of this organization shall be, for education of its members through informational talks." (R. 19.)

Exhibit "B" provides:

> "The club shall exist for the sole purpose of promoting educational, patriotic, cultural, and scientific interest in the above-named city and state." (R. 23-24.)

The District Court held in its decision (R. 33-34), that Section 1710, U. S. C. A., Title 26, did not apply to such a club as it could not be classified as social. Further, that even though it were social, it would not be taxed because of the size of the initiation fee and the annual dues.

There can be no doubt that the Butte Executives Club is a club and that the members attended meetings.

QUESTIONS PRESENTED

We are concerned with the query: Do the amounts paid by the members of the association, viz: $10.00 initiation fee and $10.00 annual dues, amount to "admission to any place" under Section 1700, U. S. C. A., Title 26? Or are they initiation fees and dues, and if so, controlled by Section 1710, U. S. C. A., Title 26?

RESPONSE TO APPELLANTS' ARGUMENT

I.

We shall proceed to answer appellants in the sequence adopted by them, beginning on page 7 of their brief.

Chimney Rock Co. v. *United States*, 63 C. Cls. 660, 275 U. S. 552, cited by appellants on page 8 of their brief, is not analogous. The toll charge there exacted was for the privilege of gaining admission to the amusement. No club question was involved.

The students activities fee case, *Min.* 5834, 1945 *Cum. Bull.* 446, cited on page 8 of appellants' brief, provides that where schools collect from students an activity fee, in return for which the student receives season books or tickets covering admissions to athletic games or other affairs, the fees paid are subject to tax as admissions. If the fee covers charge for school paper, the charges should be separated.

M. T. 6, 1942—2 *Cum. Bull.* 245, provides that an amount paid by a student of a university for season ticket for athletic or other events, constitutes an amount paid for admission by season ticket.

The *S. T.* 859, 1937—1 *Cum. Bull.* 334, citation of which appears on page 8 of appellants' brief, provides that where a club maintains a swimming pool as one of its facilities and for which the members are charged, that such charge is subject to an admission tax. If in the case at bar the members of the club were to enter a side-show for which a charge is made, the charge so made under the authority of this citation would be subject to an admission charge. There then would be some analogy.

The *S. M.* 2853, *IV*—1 *Cum. Bull.* 294 (1925) cited on page 8 of appellants' brief, has to do with a political gathering. No club question is presented there.

The *Exmoor Country Club* v. *United States*, 119 F. 2d 961 (C. A. 7th), holds that amounts paid for use of swimming pool, skating rink and for privilege of dining and dancing were taxable as an admission to any place. The appellee also maintained a private golf course and club house. Since the judgment of District Court was for the sum of $2,874.09, and since the correctness of the judgment as to $1,426.34 was not in dispute, it is fair to assume that the $1,426.34 related to dues and initiation charges and in connection with the golf course and club house.

In the case at bar, the Executives Club made no charge for food that was served. Each member who ate, paid for his meal direct to the agency that served it.

The *Twin Falls Natatorium* v. *United States*, 22 S. 2d 307 (S. D. Ohio), cited on page 8 of appellants' brief, held that charges made to the public for use of pool, dressing rooms, towels and rental of bathing suits, were taxable as an admission to any place.

The *United States* v. *Koller*, 287 *Fed.* 418 (W. D. Wash.), cited on page 8 of appellants' brief, held that a charge made to the public by a proprietor for a skating ticket before patron could be permitted to skate, whether they used own skates or not, was taxable as an admission to any place.

We cannot agree that any of the foregoing authorities sustain appellants' stand. Appellants are seeking to extend the tax statute by implication, which cannot be done.

> "It is to be remembered that we are here concerned with a taxing act with regard to which the general rule requiring adherence to the letter applies with particular strictness, and that a tax statute should not be extended by implication or enlarged by construction so as to embrace matters not therein specifically pointed out."
>
> *Crooks* v. *Harrelson*, 282 U. S. 55;
>
> *United States* v. *Merriam*, 263 U. S. 179;
>
> *United States* v. *Field*, 255 U. S. 257;
>
> *Gold* v. *Gold*, 245 U. S. 151;
>
> *Columbia Univ. Club* v. *Higgins*, 23 Fed. Sup. 572.

Any doubt as to whether or not a taxpayer should be subjected to a tax is to be resolved in favor of the taxpayer. On page 9 of appellants' brief, they say that stipulated facts support them, among which is "an additional payment is always made for food and other services furnished at the lecture."

True, an additional charge is made for food, but the charge is made by the hotel in which the meetings are held. Suppose one bought a package of peanuts instead, would that alter the case? The statement of facts makes no reference to other services furnished by the club and could not, as no other services were rendered.

Further on the same page, appellants argue that the usual concomittant features of a club are lacking—no club house, etc.

Because the Butte Executives Club could not afford these features, doesn't militate against its existence as a club. There are Rotary Clubs and many other service clubs, card clubs, and others to which reference is made in the footnote of Section 1710, U. S. C. A., Title 26, that lack the elements to which counsel makes reference.

We believe that the principle announced in the case of *White* v. *Winchester Club*, 315 U. S. 32, 41, appearing on page 10 of appellants' brief, supports our contention, and that the charges made amount to initiation and dues fees.

On page 11 of appellants' brief, counsel says that benefits consist of seven lectures a year. The record will not support him. Benefits for the first year ending the last day of June 1945, consisted of seven lectures (R. 16, 24). The year in dispute is the second year, viz. July 1, 1945, to July 1, 1946 (R. 17). The number of speakers after the first year was not fixed.

Counsel argues on page 11 of appellants' brief, that Section 1710, U. S. C. A., Title 26, is not involved. We submit that it is and that Congress intended it should govern this situation, and since Butte Executives Club is an educational club (R. 19, 23-24), then for two reasons it should not be taxed, namely: (1) It is not a social, athletic or sporting club; (2) initiation fees do not exceed $10.00.

Some of the cases cited in the footnote of Section 1710, U. S. C. A., Title 26, and especially note 12, might be authority for classing Butte Executives Club as a social club. We doubt if appellants would make the present stand that Section 1710 has no application if the initiation fees and annual dues fees exceeded the sum of $10.00, and hence made the Butte Executives Club subject to payment of the tax, assuming, of course, that it would be classified as a social club.

On page 12 of appellants' brief, counsel says that the club charged the members for admittance. The record will not support them. We believe that Article 101.2, Par. 6 of Regulations 43, cited on page 20 of appellants'

brief, is especially applicable. We direct attention to Rule 101.25, Regulations 43, which provides:

> "Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominate purpose, such as, for example, religion, the arts or business."

We also direct attention to Section 1712 (b), U. S. C. A., Title 26, and Section 101.28 of the Regulations 43, which defines initiation fees as including

> "any payment, contribution or loan required as a condition precedent to membership," etc.

Since the initiation fee of $10.00 is required to become a member of the Butte Executives Club (Exhibit "B," R. 23-26), the charge should be treated as intitiation fee and not as "admission to any place."

II.

CLAIM WAS SUFFICIENT

Section 101.42, Regulations 43, cited on page 12 of appellants' brief, provides that a claim for refund must be filed by the person against whom they were assessed or by whom they were in the first instance erroneously or illegally paid. It further provides that in any case where a club as an agent of its members, seeks a refund of taxes, the claim must be accompanied by powers of attorney of the members, etc.

In the case at bar, no taxes were assessed against the

members of the club. The assessment was made against the club and it was the club that paid them. In this case, the club is not seeking a refund as agent of its members. The club was taxed as an entity. The money was taken from the club. Its only source of revenue was initiation and annual dues. No other money was collected from members either as taxes or otherwise (R. 18). The members had not paid a tax. They had paid initiation and annual dues for which amounts the club planned to procure speakers. The tax was imposed upon the club, and the amount in question was taken from the initiation and dues fund, thereby reducing the number and quality of speakers the club planned to provide.

The *Builders' Club of Chicago* v. *United States*, 14 F. Supp. 1020, cited on page 13 of appellants' brief, holds that Regulations 101.42 is invalid and that the club is the proper entity to claim and secure a refund.

The *Engineer's Club of Philadelphia* v. *United States*, 42 F. Supp. 182, cited on page 14 of appellants' brief, did not impose a tax on admission. It held that the club was social and that amounts paid for initiation and annual dues were taxable under Section 1710, U. S. C. A., Title 26.

The *Turks Head Club* v. *Broderick*, 166 F. 2d 877 (C. A. 1st), cited on page 14 of appellants' brief, had to do with a social club, and in that case, reference is made to Section 101.37 of Regulations 43 (1941), providing that in social, athletic or sporting clubs, the club shall collect the taxes at time of paying initiation and annual dues, and that in the event a member refuses to pay, and upon notice given to the Commissioner, the Commissioner shall make a direct assessment. The Commissioner knew the members had not paid any tax (R. 18, 13). The Commissioner ruled that the club should pay the tax under

Section 1700 (a), U. S. C. A., Title 26, notwithstanding Section 101.37 of Regulations 43 and paragraph 2 of Section 1700 (a), which provide that the tax shall be paid by the person paying for the admission.

The *Turks Head Club* v. *Broderick*, 166 F. 2d 877 (C. A. 1st), gave no consideration to Rules 17 (b) and 23, Federal Rules of Civil Procedure. Rule 17 (b) provides:

> "In all other cases, capacity to sue or be sued, shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it, a substantive right existing under the Constitution or laws of the United States."

Section 101.42 of Regulations 43 (1941) not only attempts to legislate (the *Builders' Club of Chicago* v. *United States*, 14 F. Supp. 1020), but it attempts to alter the rules governing Federal Courts. If the courts of the nation settle disputes and prescribe rules governing such disputes, certainly a governmental agency cannot impose conditions limiting the right of a court to acquire jurisdiction. The same may be said of Rule 23, Federal Rules, which provides for an action by few in behalf of many in certain instances.

The Commissioner has power to make reasonable regulations. If he has power to make them, he has power to modify, change or cancel them. If he has these powers, he has the power to waive rules. In this instance, Commissioner waived the regulations requiring powers of attorney, etc., by passing on the merits of the claim (R. 28-30). (33 Corpus Juris 349, Sections 229 and 230.)

In the case of *Tucker* v. *Alexander*, 275 U. S. 228, 72 L. Ed. 253, the Supreme Court said:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund, and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the Government, and decidely in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits, on a first trial without imposing upon Government and taxpayer, the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulation may not be waived for that purpose.*" (Italics ours.)

On page 15 of appellants' brief, he says the obvious purpose of this provision is to protect the government from having to pay twice. The prime purpose of a regulation is to expedite the administration of a law. If it does more than that, it isn't valid. The judicial branch of the government is charged with the responsibility of prescribing the rules which should control judicial proceedings. The judicial branch of the government has adopted the rules 17 (b) and 23, and by these rules it has granted the plaintiffs, Butte Executives Club and the members, Newland, Tullis and Martin, the right to sue, and no governmental agency has the right to qualify or amend these rules.

33 Corpus Juris 286-287, Sec. 32.

CONCLUSION

Did the Congress intend that money paid to a unit such as Butte Executives Club, should be taxed as an "admission to any place?" We contend that it did not, and that a careful consideration of Section 1710, Title 26, U. S. C. A. confirms the stand taken by appellees. Also that the Commissioner of Internal Revenue and Secretary of Treasury did not so intend by reason of the rules and regulations adopted by them and set forth above, and that they intended the payments should be treated as initiation and dues payments.

Respectfully submitted,

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October, 1949